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No. 02-1623

In the Supreme Court of the United States

TULARE COUNTY, CALIFORNIA, ET AL., PETITIONERS

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In the year 2000, the President issued a proclamation creating the Giant Sequoia National Monument. The President acted pursuant to the Antiquities Act of 1906 (Antiquities Act), which authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated upon federal land "to be national monuments." 16 U.S.C. 431. The questions presented are as follows:

1. Whether the district court correctly dismissed petitioners' claims that the Presidential proclamation did not comply with the standards set forth in the Antiquities Act.

2. Whether the Antiquities Act is a valid statutory grant of authority to the President.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 306 F.3d 1138. The statement (Pet. App. 33-34) issued by the panel upon denial of rehearing en banc is reported at 317 F.3d 227.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2002. A petition for rehearing was denied on February 4, 2003 (Pet. App. 33). The petition for a writ of certiorari was filed on May 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Antiquities Act of 1906 (Antiquities Act or Act), 16 U.S.C. 431 *et seq.*, confers authority upon the President to set aside federal lands to be managed as national monuments. The Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. 431. The Antiquities Act contains no provision for judicial review.

2. On April 15, 2000, President Clinton issued a proclamation establishing the Giant Sequoia National Monument in south-central California. Pet. App. 35-44. The President established the Monument, which comprises 327,769 acres located within the Sequoia National Forest, in order to protect a variety of objects of historic and scientific interest, including groves of towering giant sequoias, geologic and volcanic features, rare and endemic plant and animal species, archaeological sites, and historic remnants of early Euroamerican settlement and the exploitation of the giant sequoias. *Id.* at 35-40. Creation of the Monument, the proclamation stated, would "provide[] exemplary opportunities for biologists, geologists, paleontologists, archaeologists, and historians to study these objects." *Id.* at 35. The President invoked the Antiquities Act as the

source of his authority to issue the proclamation. *Id.* at 39. The proclamation specifically stated that the land set aside "is the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 40.

3. Petitioners filed suit in federal district court, challenging the Presidential proclamation that established the Giant Sequoia National Monument. See Pet. App. 45-96 (complaint). Petitioners contended, *inter alia*, that the proclamation violated the Antiquities Act because it failed to identify with sufficient precision the objects to be protected (Count 1); designated natural features, such as ecosystems, that allegedly do not qualify for protection under the Act (Count 2); failed to ensure that the size of the Monument was limited to the smallest area compatible with the proper care and management of the objects to be protected (Count 3); and increased the likelihood of harm due to fire by prohibiting commercial timber harvesting and by limiting road construction (Count 4). See *id.* at 78-84, 93-94. In Count 5, petitioners further alleged that, if the Antiquities Act authorizes the President to issue the proclamation in question, the Act effects an unconstitutional delegation of legislative power. See *id.* at 84-85, 94.

The district court dismissed the complaint in its entirety. Pet. App. 11-32. With respect to Counts 1-4 of petitioners' complaint, the court explained:

> While this court can evaluate whether President Clinton exercised his discretion in accordance with the standards of the Antiquities Act, this court cannot review the President's determinations and factual findings, as [petitioners] suggest. To do so would invade the legislative and executive domains

> because Congress has directed that the President, "in his discretion," make these findings. Accordingly, this court limits its examination to the face of the Proclamation.

Id. at 20. The court found that the proclamation on its face complies with the standards set forth in the Antiquities Act and that Counts 1-4 of petitioners' complaint should therefore be dismissed. *Id.* at 21. The court also dismissed Count 5, holding that the Antiquities Act contains meaningful standards and limitations to cabin the President's discretion and therefore represents a permissible grant of authority under the Property Clause of the Constitution, Art. IV, § 3, Cl. 2. See Pet. App. 21-23.

4. The court of appeals affirmed. Pet. App. 1-10. The court held that the Antiquities Act does not require the President to identify a precise location for each item of scientific or historic interest within a designated monument, and that Count 1 of petitioners' complaint therefore failed as a matter of law. *Id.* at 5. The court held that Count 2 failed as a matter of law as well because "such items as ecosystems and scenic vistas" are permissible objects of protection under the terms of the Antiquities Act. *Id.* at 6.

The court of appeals likewise affirmed the dismissal of Counts 3 and 4 of petitioners' complaint, concluding that petitioners had failed to allege facts sufficient to state a claim. Pet. App. 6-8. With respect to Count 3, the court found that petitioners' core allegation—*i.e.*, that the President had failed to ensure that the designated tract "is the smallest area compatible with the proper care and management of the objects to be protected," as required by 16 U.S.C. 431—"is a legal conclusion couched as a factual allegation." Pet. App. 6.

The court explained that petitioners' complaint "fails to identify the improperly designated lands with sufficient particularity to state a claim," and therefore "does not make the factual allegations sufficient to support its claims." *Id.* at 7. "This is particularly so," the court stated, because petitioners' "claim that the Proclamation covered too much land is dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which [petitioners] made no factual allegations." *Ibid.* The court similarly held that Count 4 was subject to dismissal because it "contains no factual allegations" to support its conclusory assertion that the risk of wildfires has increased under the current management regime. See *id.* at 7-8. With respect to Count 5, the court held that petitioners' constitutional non-delegation claim failed as a matter of law because the Antiquities Act "includes intelligible principles to guide the President's action." *Id.* at 8 (quoting *Mountain States Legal Found.* v. *Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002), petition for cert. pending, No. 02-1590 (filed Apr. 30, 2003)).

The court of appeals subsequently denied petitioners' petition for rehearing en banc. Pet. App. 33. At that time, the panel that had ruled on petitioners' appeal issued the following statement:

> Contrary to [petitioners'] argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a). The court affirmed the district court's dismissal, for example, of Count III of the complaint because it contained no factual allegations that any part of the Monument lacked scientific or historical value. The allegation that Sequoia groves comprise only six percent of the Monument might well have been

> sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area. It was therefore incumbent upon [petitioners] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect. That, and nothing more, is what led the court to conclude that the complaint did not identify improperly designated lands "with sufficient particularity."

Id. at 34.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Contrary to petitioners' contention (*e.g.*, Pet. 10-11), the court of appeals did not impose "heightened pleading standards" requiring more specific factual averments than are required by Federal Rule of Civil Procedure 8(a). Further review is not warranted.*

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* Petitioners' complaint named as defendants, *inter alia*, the President of the United States in his official capacity. See Pet. App. 45-46. This Court's decisions strongly indicate that courts lack authority to award declaratory or injunctive relief against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 825-829 (1992) (Scalia, J., concurring in part and concurring in the judgment). In any event, the President is not an "agency" subject to suit under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), see *Franklin*, 505 U.S. at 800-801 (opinion of the Court); the Antiquities Act contains no judicial review provision; and petitioners identify no other provision of law that purports to authorize the filing of a suit against the President under the circumstances presented here. In addition to the President, however, petitioners in this case, unlike the petitioners in *Mountain States Legal Foundation* v. *Bush*, *supra*, have named as defendants the federal

1. The court of appeals affirmed the dismissal of Counts 1 and 2 of petitioners' complaint on purely legal grounds. Count 1 of the complaint alleged that the Presidential proclamation violated the Antiquities Act because the proclamation itself did not identify "by physical description and geographic location" the objects of historic and scientific interest to be protected. Pet. App. 79. The court of appeals held that "[n]o such requirement exists" under the Antiquities Act. *Id.* at 5. The court explained that "[b]y identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard. Hence, Count 1 fails as a matter of law." *Ibid.*

Count 2 of petitioners' complaint likewise failed as a purely legal matter. Count 2 alleged that the proclamation was invalid because it designated for protection "[l]andscapes, scenic areas, ecosystems and other amorphous and imprecise items." Pet. App. 80. The court of appeals held that inclusion of such items did not contravene the terms of the statute. *Id.* at 6. The court noted that in *Cappaert* v. *United States*, 426 U.S. 128, 141-142 (1976), this Court held that "the President's Antiquities Act authority is not limited to protecting only archeological sites." Pet. App. 6; see also *Cameron* v. *United States*, 252 U.S. 450, 455-456 (1920) (sustaining designation of Grand Canyon as national monument under Antiquities Act).

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agencies and subordinate Executive Branch officials charged with managing the public lands in question. See Pet. App. 45-46. The unavailability of judicial process to compel or prohibit the President's performance of an official act therefore does not provide an independent ground for dismissal of petitioners' suit or for denial of certiorari.

Because Counts 1 and 2 of petitioners' complaint call into question the facial validity of the Presidential proclamation, the court of appeals correctly held that development of a factual record was unnecessary to resolve those claims. Petitioners identify no judicial decision supporting their contentions in Counts 1 and 2 that the proclamation on its face was inconsistent with the terms of the Antiquities Act. The court of appeals' disposition of those counts therefore presents no issue warranting this Court's review.

2. In affirming the district court's dismissal of Counts 3 and 4, the court of appeals relied on the conclusory nature of petitioners' allegations, and it left open the possibility that those counts might have survived a motion to dismiss if the complaint had contained more specific factual allegations. See Pet. App. 6-8. In its statement issued upon denial of rehearing en banc, however, the court specifically disclaimed any intent to impose a heightened pleading requirement. See *id.* at 34. Petitioners do not contend that the court of appeals announced any rule of law governing the pleading of federal claims, either under the Antiquities Act or more generally, that can be expected to affect the disposition of future cases. Petitioners' contention that the court misapplied established pleading rules to the facts of this case presents no issue of recurring importance warranting this Court's review.

In any event, Counts 3 and 4 of petitioners' complaint are subject to dismissal on the independent ground that the claims raised therein are not judicially reviewable. See Pet. App. 20 (district court states that a Presidential proclamation issued pursuant to the Antiquities Act is reviewable for facial compliance with the Act, but that a court "cannot review the President's determinations and factual findings"). Counts 3 and 4 of peti-

tioners' complaint allege that (a) the President failed to ensure that the size of the Monument is "confined to the smallest area compatible with the proper care and management of the objects to be protected," as required by 16 U.S.C. 431, and (b) the proclamation increases the risk of harm through wildfire to objects within the designated area. See Pet. App. 81-84, 94. The proclamation itself specifically states, however, that the tract reserved for the Giant Sequoia National Monument "is the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 40. And, as the court of appeals recognized, "the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection." *Id.* at 7; see *id.* at 36-37. Counts 3 and 4 of petitioners' complaint thus allege in substance that the President abused the discretion conferred on him by the Antiquities Act in assessing the environmental and other factors bearing on the propriety of the Monument designation.

Even as a general matter, waivers of sovereign immunity must be express, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and there is no waiver of sovereign immunity for the abuse-of-discretion claim advanced by petitioners here. But in addition, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," this Court "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992); accord *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) ("[W]here a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it

involves considerations which are beyond the reach of judicial power.") (brackets and internal quotation marks omitted); *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (application by the President of a statutory standard to a particular set of facts "is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."). Neither the Antiquities Act nor any other federal statute authorizes abuse-of-discretion review of the President's designation of national monuments under the Act. Petitioners' abuse-of-discretion claims therefore would not be justiciable even if they had been pleaded in an adequate manner.

3. Count 5 of petitioners' complaint alleged that, if the proclamation establishing the Giant Sequoia National Monument is authorized by the Antiquities Act, the Act effects an unconstitutional delegation of legislative power. See Pet. App. 84-85, 94. The court of appeals correctly affirmed the district court's dismissal of that claim, holding that the Act contains "intelligible principles" that circumscribe the President's discretion. *Id.* at 8. Although petitioners challenge that holding (see Pet. 22), they identify no judicial decision that has held this or any comparable federal statute to be an unconstitutional delegation of legislative power.

Petitioners also contend (Pet. 22) that, if the dismissal of Counts 1-4 of their complaint is sustained, then "the President's actions are in no way restrained by the intelligible principles set forth in the Act because they are not subject to any meaningful judicial review." That claim lacks merit. The courts below reviewed, and rejected on the merits, petitioners' claims that the challenged proclamation was facially inconsistent with the standards set forth in the Antiquities Act. Because Presidential actions are entitled to a

strong presumption of regularity, cf. *Department of State* v. *Ray*, 502 U.S. 164, 179 (1991) (courts "generally accord Government records and official conduct a presumption of legitimacy"), the proclamation must be assumed to reflect a good-faith determination by the President that the Antiquities Act standards are satisfied. The statutory criteria thus meaningfully constrain the President's authority, even though the President's factual determinations are not subject to judicial review. And the established principle that Presidential action is presumptively unreviewable for abuse of discretion would be wholly subverted if the absence of such review rendered the governing statute an unconstitutional delegation of legislative power. Indeed, the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) provides that even ordinary agency action is not subject to judicial review to the extent a statute precludes review or the matter is committed to agency discretion by law, see 5 U.S.C. 701(a), and the absence of judicial review in those circumstances has never been thought to raise the sort of unconstitutional delegation question that petitioners assert here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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